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No. 84-1287

In The

Supreme Court of the United States

October Term, 1985

LOUIS LIPHETE, ET AL.,

Petitioners,

v.

MERRITT STIERHEIM, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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This Brief of Petitioners is filed in response to the Brief for the United States as Amicus Curiae. The United States, as Amicus Curiae, contends that Petitioners misunderstand both their immigration status and Florida law in asserting that the decision below conflicts with the Supremacy, Equal Protection and Due Process Clauses. (Brief of the United States as Amicus Curiae ("U.S.

Br.") at 4). In their attempt to convince the Court to deny further review, however, the United States confuses discrete categories of aliens, misconstrues this Court's decisions in *Toll v. Moreno,* 458 U.S. 1 (1982) and *Elkins v. Moreno,* 435 U.S. 647 (1978), and mischaracterizes Petitioners' challenge to Florida law.

I. The Solicitor General's Brief Misperceives The Immigration Status Of Petitioners, And As A Result, Incorrectly Asserts The Inapplicability Of Cases Such As Toll v. Moreno, 458 U.S. 1 (1982) And Elkins v. Moreno, 435 U.S. 647 (1978).

Contrary to the Solicitor General's contentions, Petitioners are *not* excludable aliens paroled into the United States pursuant to § 212(d)(5), Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5). They are "Cuban/Haitian Entrants", a special immigration status created by the Executive Branch under authority of the U.S. Coordinator for Refugee Affairs and the Commissioner of the Immigration and Naturalization Service acting pursuant to the Refugee Act of 1980 and the Immigration and Nationality Act. (See, Petitioners' Appendix A32-A33; A40-A47). Indeed, the Solicitor concedes that the government "created a special status designated as 'Cuban/Haitian Entrants (status pending)'." (U.S. Br. at 2). The Solicitor further concedes that Cuban/Haitian Entrants are a "discrete group of aliens", (U.S. Br. at 4), and a group that has been given a variety of benefits not accorded other aliens. (U.S. Br. at 3 n.1). Contrary to the Solicitor General's contention, the members of this status are not exclusively excludable aliens. Indeed, the

majority of the Haitian Entrants, i.e., those in immigration proceedings prior to October 10, 1980, are aliens who entered the United States and are, therefore, *deportable* rather than excludable aliens. Hearing before the Subcommittee on Immigration, Refugeees, and International Law, House Comm. on the Judiciary, 98th Cong. 2d Sess. 112 (May 9, 1984), set forth as an appendix hereto.

The real point, however, is not that the Entrants are deportable or excludable aliens, i.e., simply, aliens whose status is under active challenge by the government and whose deportation is imminent. Rather, Petitioners are aliens accorded a special regularized status for over five years that precludes the Immigration and Naturalization Service from subjecting them to proceedings for exclusion or deportation and which permits them to reside in our country as the functional equivalent of lawfully admitted aliens. Moreover, the contemplation, not only of these aliens but also of the President and Congress, is that these aliens will become lawful permanent residents. See statement of U.S. Coordinator for Refugee Affairs, set forth in Petitioners' Petition for Writ of Certiorari, A42 ("the President has decided to seek special legislation regularizing the status of Cuban/Haitian Entrants. This legislation will allow them to remain in the United States and will make them eligible for certain benefits . . ."); (U.S. Br. at 6 n.5); *See,* S1200, Title II § 202(a)(2)(D) (pending legislation, already passed by the Senate, adjusting the status of Cuban/Haitian Entrants to permanent residents).[1] Indeed, the Solicitor recognizes the legislation

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[1]The Solicitor's reference to *Jean v. Nelson,* 105 S.Ct. 2992 (1985) is inapposite in this context. As stated above, Cuban/Haitian entrant status is not a status for excludable aliens; nor are any of the class members in *Jean* categorized as Cuban/Haitian entrants.

and special treatment that characterizes the Cuban/Haitian entrant status. (U.S. Br. at 3 n.1; 7 n.5). Thus, Cuban/Haitain Entrants, by the Solicitor's own concessions, are in a far different status than those aliens who are "still in theory at the boundary line and ha[ve] gained no foothold in the United States." *Leng May Ma v. Barber,* 357 U.S. 185, 189 quoting *Kaplan v. Tod,* 267 U.S. 228, 230 (1925). (U.S. Br. at 7).

The Solicitor General's misunderstanding of the special status of Cuban/Haitain Entrants leads him to erroneously assert the inapplicability of cases such as *Toll v. Moreno,* 458 U.S. 1 (1982). *Toll* stands for the proposition that state regulation that discriminates against aliens who have not been precluded by Congress from establishing domicile in the United States is impermissible if it imposes additional burdens not contemplated by Congress. *Toll, supra,* at 12-13. The critical distinction drawn in *Toll* between the G-4 status and several other immigration statuses was that the former status does not bar an alien from acquiring domicile in the United States, while aliens with the latter statuses were precluded by Congress from establishing docimile. See *Toll, supra,* at 14 n.20. *Toll,* thus, stands for the proposition that unless Congress has precluded an alien, whether immigrant or non-immigrant (as in the case of a G-4 visa holder), from establishing domicile in the United States, then any state's decision to deny the benefits of domicile to an alien, *solely* on account of his or her immigration status ". . . . surely amounts to an ancillary burden not contemplated by the Congress . . . ." *Toll, supra* at 14 (emphasis in original).

The Cuban/Haitian entrant status involved here is thus, analogous to the G-4 category involved in *Toll,* rather

than the other immigration statuses distinguished from G-4 in *Toll* because Congress has not precluded Cuban/Haitian Entrants from establishing domicile. Indeed, both the Executive and Congress, despite the Solicitor's comments to the contrary, recognize the permanence of the Cuban/Haitian Entrants and seek now merely to formalize that permanence through legislation. (U.S. Br. at 6 n.5). Here, the state of Florida has created "ancillary burdens" on Cuban/Haitian Entrants not contemplated by Congress.

II. The Solicitor's Misconception Of The Special Status Of Cuban/Haitian Entrants Also Results In His Misapplication Of Vlandis v. Kline, 412 U.S. 441 (1973) and Weinberger v. Salfi, 422 U.S. 749 (1975)

The Solicitor's argument with regard to *Vlandis* and *Salfi* rest entirely upon his misconception of Petitioners' status. The Solicitor claims that Petitioners have no due process claim under either *Vlandis* or *Salfi* because "parolees are not entitled to claim permanent residence or domicile in the United States . . . ." (U.S. Br. at 11). As stated above, however, Petitioners are not parolees. As Cuban/Haitian Entrants, their "special status" at a minimum entitles them to form the intent to remain in the United States permanently. Despite the Petitioner's ability to demonstrate that they meet all the criteria for domicile under the law of the State of Florida, the State precludes them even from the opportunity of establishing their domicile solely because they do not have permanent immigrant visas. As this Court recognized in *Elkins*, the State of Florida is precluded from taking this position under *Vlandis* as limited by *Salfi*. Here, as in

Elkins, "this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a state 'purport[s] to be concerned with [domicile but] at the same time den[ies] to one seeking to meet a test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger v. Salfi*, 422 U.S. at 771." *Elkins*, 435 U.S. 647 at 660.

The Solicitor, of course, concedes that that is precisely what the State of Florida has done here. (U.S. Br. at 9 n.8). Indeed, the Solicitor also concedes that *Vlandis* would apply in other contexts, (U.S. Br. at 11), but denies its validity here solely because of his misunderstanding of the Cuban/Haitian Entrant status.

III. The Solicitor's Equal Protection Argument Is Contrary To Plyler v. Doe, 457 U.S. 202 (1982) And Other Decisions Of This Court And Is, Again, Based On A False Assumption Concerning Petitioner's Status

The Solicitor contends that Florida does not establish classifications based on alienage but rather based upon residency. (U.S. Br. at 10). This statement, however, patently contradicts the Solicitor's recognition that the Florida scheme is invalid because it distinguishes between various categories or aliens and "[t]o the extent that [it] would deny permanent resident status to persons such as G-4 aliens who may become domiciliaries of the United States, that portion of the Florida system may not survive *Toll* and *Elkins*." (U.S. Br. at 9 n.8).

The Solicitor finds the distinction drawn by the State of Florida permissible with respect to the Petitioners solely because their status as parolees does not permit them to

have any legitimate expectation that they will be permitted to remain in the United States. (U.S. Br. at 10).

The Solicitor's contentions are in error for several reasons. First, the Solicitor is in error as to Cuban/Haitian Entrants as the majority are not parolees. Second, the judicial gloss placed upon Florida's Homestead Tax Exemption Statue clearly distinguishes between groups of aliens. In *Juarrero v. McNayr,* 157 So.2d 79 (Fla. 1963) and *Matter of Cooke,* 412 So.2d 340 (Fla. 1982), the Florida Supreme Court's judicial gloss upon the statute establishes two classes of aliens for purposes of determining domicile in the State of Florida. Persons who hold lawful permanent immigrant visas are given one status while all other aliens are given another. Even the Solicitor recognizes that this scheme would not survive judicial scrutiny as to some of the groups of aliens that are excluded. (U.S. Br. at 9 n.8). Florida, of course, did not deny tax exempt status to Petitioners based on "... restrictions imposed on parolees by Federal law" (U.S. Br. at 10), but rather based on *Juarrero,* which divides aliens between those with lawful permanent resident visas and all others.

The Solicitor's claim that this distinction, as it applies to Petitioners, would be valid because Petitioners are "parolees", flies directly in the face of *Plyler v. Doe,* 457 U.S. 202 (1982), even if we were to assume *arguendo* that Petitioners were parolees. As the Court held in *Plyler,* even an undocumented alien cannot be deprived of a state benefit solely because of his status. In *Plyler,* this Court squarely rejected the argument "that the undocumented status of these [alien] children *vel non* establishes a sufficient rational basis for denying them benefits that a state

might choose to afford other residents." *Plyler*, 457 U.S. at 224. The Solicitor's argument, therefore, that the Petitioners' alleged status as parolees is a legitimate basis for denying them State tax exemption is directly contrary to *Plyler*.

In the present case, of course, Petitioners have a much stronger case than the undocumented aliens in *Plyler*. Petitioners are in a legal status created especially for them. No rational basis can be advanced for discriminating against aliens who can and have formed the intent to reside in the United States permanently and to make Florida their domicile.[2]

Finally, the Solicitor's claim that the distinction drawn by the State of Florida is rationally based because persons such as the Petitioners could "have no legitimate expectation that they will be permitted to remain in the United States", (U.S. Br. at 10), simply flies in the face of the Cuban/Haitian entrant status. The status is one which directly contemplates, by its very existence, persons who will remain in the United States until legislation is approved to permit them to become lawful permanent residents. (See, Petitioners' Appendix to its Petition for Writ of Certiorari at A-40-A-47).

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[2]The Solicitor is also in error with respect to the position that strict scrutiny does not apply. The Solicitor's claim that strict scrutiny is inapplicable without "a showing of discriminatory intent" (U.S. Br. at 10), is inapplicable to a case, such as this one, where the State's judicial gloss makes the statute facially invalid. This is not a case of discriminatory impact. Rather, the state court's interpretation discriminates against all persons who are not United States citizens or permanent immigrant visa holders.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in the Petition for Certiorari, this Court should issue the writ to declare that the State of Florida may not make impermissible distinctions based on the Petitioners' Cuban/Haitian entrant status.

Respectfully submitted,

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APPENDIX

CUBAN/HAITIAN ADJUSTMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON

IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

98TH CONGRESS

SECOND SESSION

ON

H.R. 4853

CUBAN/HAITIAN ADJUSTMENT

MAY 9, 1984

SERIAL NO. 64

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APPENDIX 2

HAITIAN ARRIVALS BY MONTH AND YEAR

(EPI and EWI*)

		Monthly/ Yearly Total	Cumu- lative Total	Ins Exclusion Cases (EPI)	Ins Deportation Cases (EWI)**
1971-1979		5912	5912	1830	4082
1980		24530	30442	13136	11394
		* * *			
1980	Jan	1063	6975	502	561
	Feb	919	7894	164	755
	Mar	1947	9841	889	1058
	Apr	2165	12006	1004	1161
	May	2719	14725	1081	1638
	Jun	2247	16972	1048	1199
	Jul	1721	18693	890	831
	Aug	2477	21170	1585	892
	Sep	3347	24517	2155	1192
	Oct	3331	27848	2426	905
	Nov	1274	29122	680	594
	Dec	1320	30442	634	685
		* * *			

*EPI: Entered and Processed Immediately EWI: Entered Without Inspection

**Changed INS processing/deportation procedures ended EWI registration in June 1981.

SOURCE: HHS/ORR